(1)

84-1512

No. 84 -

Supreme Court, U.S.
FILED
MAR 21 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1984

CHARLES SOTERAS

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT J. WEBER
221 N. LaSalle St.
Suite 3800
Chicago, IL 60601
(312) 782-1983

Counsel for Petitioner

38 pp

QUESTION PRESENTED

i - Whether permitting an alternate juror, who has been discharged, to join the jury deliberations after the jury has retired and after one of the regular jurors is excused constitutes reversible error.

INDEX TO PETITION

	Page
Table of Authorities	ii
Opinion Below.	1
Parties Below.	1
Jurisdiction	1
Rule Involved	2
Statement of the Case	3
Reasons for Granting the Writ. . . .	7
Conclusion	14
Appendix A	16

TABLE OF AUTHORITIES

Cases	Page
People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976).	13
People v. Ryan, 19 N.Y.2d 100 224 N.E.2d 710 (1966)	14
United States v. Barker, 735 F.2d 1280, 1281-3 (11th Cir. 1984).	9
United States v. Crisco, 725 F.2d 1228, 1233 (9th Cir. 1984)	8

TABLE OF AUTHORITIES
(cont.)

	Page
United States v. Evans, 635 F.2d 1124, 1127 (4th Cir. 1980)	9
United States v. Foster, 711 F.2d 871, 885-6 (9th Cir. 1983)	8
United States v. Kaminski, 692 F.2d 505, 518 (8th Cir. 1982). . .	8
United States v. Kopituk, 690 F.2d 1289, 1311 (11th Cir. 1982) .	10
United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975)	9
United States v. Leser, 358 F.2d 313 (9th Cir. 1965) pet. for cert. dsm. 385 U.S. 802 (1966) . .	8
United States v. Lopez, 581 F.2d 1338, 1342 (9th Cir. 1978)	8
United States v. Rubio, 727 F.2d 786, 799 (9th Cir. 1983)	8
United States v. Virginia Erection Corporation, 335 F.2d 868, 871 (4th Cir. 1964).	13

TABLE OF AUTHORITIES
(cont.)

	Page
STATUTES	
18 U.S.C. 371	3
18 U.S.C. 659	3
28 U.S.C. 1254	2
ARTICLES	
Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43, 46	13
RULES	
Rule 24(c) of the Fed. R. Cr. P. .	2, 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES SOTERAS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Charles Soteras, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceedings on January 22, 1985.

OPINION BELOW

The opinion of the court of appeals is, as yet, unreported; however, it appears as Appendix A hereto.

PARTIES BELOW

The names of all parties to this proceeding in the court of appeals are John Josefik and Charles Soteras.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1985. This petition for certiorari is timely filed within 60 days after the entry of judgment in the court below pursuant to Rule 20 of

the Rules of the Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

RULE INVOLVED

Rule 24(c) of the Federal Rules of Criminal Procedure:

> "(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate

jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror."

STATEMENT OF THE CASE

The judgment below was entered on a verdict of guilty on both counts of a two count indictment charging the defendant, Charles Soteras (hereinafter referred to as "the Defendant"), and others with violations of (1) 18 U.S.C. 371 (Conspiracy) and (2) 18 U.S.C. 659 (Possession of Property Stolen from an Interstate Shipment). The trial began on Monday, May 16, 1983 with the selection of a jury consisting of twelve regular and two alternate jurors. On Tuesday, May 17, 1983, opening statements were given and the government began its case-

in-chief. On Wednesday, May 18, 1983, the third day of trial, one of the jurors failed to appear. There is no explanation or follow-up in the record regarding this. After attempting unsuccessfullly to reach the missing juror, the court notwithstanding the objection of counsel, decided to proceed with 13 jurors.

Tuesday, May 24, was the last day of trial and concluded with closing arguments and instructions. The court excused the remaining alternate juror saying:

> "Alright, ladies and gentlemen, at this time it is appropriate to dismiss the alternate juror. We thank you very much for having been very patient and you have paid as much attention as you would if you were a regular juror, we could not start the case without alternates as this case is demonstrated--we needed one of the alternates--so we very much appreciate your service."

The alternate left and the jury retired from the courtroom at 4:45 p.m. At approximately 8:15 p.m., the court and

some counsel met regarding a note that was received from one of the jurors and read as follows:

> "Your Honor, sorry. I am excusing myself. I can't come to a verdict. My answer is a question mark, ?"

The note was signed "Ann Jenunes" and further signed by the foreperson. The note bore the time of 7:39 p.m. After a discussion with counsel, the judge wrote the jury as follows:

> "Jury, I have received the note from the juror who states that she is unable to deliberate. If that is still the case, please cease your deliberations, and I will call you out to the courtroom to discuss the situation as soon as all of the lawyers return to the courtroom. If the juror is able to continue the deliberations, please do continue. Thank you. Judge Getzendanner."

A short time later, the foreperson returned a note saying: "Jurist wants out." The judge then instructed the jury to cease deliberations. This occurred at 8:20 p.m.

When the jury returned to the courtroom, the following dialogue took place:

"THE COURT: Yes. Ma'am, are you unwilling to continue to deliberate?

JUROR JENUNES: Well, in a way, yes, your Honor. I'll be honest. First, I love my God and my country, and I want to do justice with mercy. I like all people, so I--I can't explain it, so maybe I ought to be excused.

THE COURT: Well, do you not--

JUROR JENUNES: My verdict wouldn't be good. Well, when I look, I say, 'God bless America'."

At this point, another juror interjected to say that Juror Jenunes told them that she did not hear portions of the trial. With this, Juror Jenunes said:

"I'll be honest. I couldn't hear at times. God knows. See, before, my ear--my right ear, there wasn't any noises, and now there is kind of noises, but I still hear, but at times, I didn't hear and God have mercy. I don't want to say 'guilty' or, you know 'not guilty." God have mercy, you know."

The court excused the juror and indicated that she had contacted the alternate juror.

The next morning, May 25, 1983, the alternate appeared in court and was permitted to join the jury. There was some discussion between the court and counsel regarding the options available. At this point, the attorneys stipulated that the alternate may rejoin the jury. That day, the jury returned the verdict of guilty on both counts.

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Conflict With A Decision Of the Ninth Circuit Court of Appeals On The Same Matter And Sanctions A Breach of Rule 24(c) Of The Federal Rules of Criminal Procedure.

Fed. R. Crim. P. 24(c) ("the Rule") states in pertinent part as follows:

> "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or

> disqualified to perform their duties. . .An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. . . ." (Emphasis provided)

In the decision below, the court of appeals admits that calling the alternate and permitting the alternate to join the deliberating jury violates the Rule. In fact, with two exceptions, every case involving this question admits that such action violates the Rule. United States v. Kaminski, 692 F.2d 505, 518 (8th Cir. 1982); United States v. Leser, 358 F.2d 313 (9th Cir. 1965) (petition for cert. dismissed, 385 U.S. 802, 1966); United States v. Lopez, 531 F.2d 1338, 1342 (9th Cir. 1978); United States v. Foster, 711 F.2d 871, 885-6 (9th Cir. 1983); United States v. Rubio, 727 F.2d 786, 799 (9th Cir. 1983); United States v. Crisco, 725 F.2d 1228, 1233 (9th Cir.

1984). The two cases which hold that such action is not a violation of the Rule are United States v. Barker, 735 F.2d 1280, 1281-3 (11th Cir. 1984) and United States v. Evans, 635 F.2d 1124, 1127 (4th Cir. 1980).

In United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975), the court discussed the Rule as follows:

> "The unambiguous language of the Rule and the cases interpreting it have impelled one of the Nation's most prestigious legal commentators to conclude that '. . .it is reversible error, even though defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate or to substitute an alternate after deliberations have begun'." C.Wright, Fed. Practice and Procedure, § 388, Vol. 2 at p. 52 (1969). (Emphasis supplied)

The court in Lamb noted the reasons for the mandatory language in the Rule. First, there is the inherent coercive effect upon an alternate who joins a jury that

has agreed that the accused is guilty. Second, the procedure significantly limits the accused's right to a mistrial if the original jury cannot reach agreement. Finally, there is the practical problem of insuring that the alternate would remain qualified.

In its opinion below, the Seventh Circuit indicates that panels of the Ninth Circuit have repeatedly rejected the statement in Lamb. However, a review of the decisions of the Ninth Circuit reflect that this statement is not correct. Distinctions have been made on the basis that the substituted alternate juror could not have been coerced or was not otherwise disqualified. However, Lamb continues to have vitality.

In United States v. Kopituk, 690 F.2d 1289, 1311 (11th Cir. 1982), the opinion of the court hit upon what is

has agreed that the accused is guilty. Second, the procedure significantly limits the accused's right to a mistrial if the original jury cannot reach agreement. Finally, there is the practical problem of insuring that the alternate would remain qualified.

In its opinion below, the Seventh Circuit indicates that panels of the Ninth Circuit have repeatedly rejected the statement in Lamb. However, a review of the decisions of the Ninth Circuit reflect that this statement is not correct. Distinctions have been made on the basis that the substituted alternate juror could not have been coerced or was not otherwise disqualified. However, Lamb continues to have vitality.

In United States v. Kopituk, 690 F.2d 1289, 1311 (11th Cir. 1982), the opinion of the court hit upon what is

becoming the routine disregard of the Rule. The court said:

> "Our decision that substitution of the alternate juror after deliberations had begun does not constitute reversible error should not be misconstrued as a stamp of approval upon such a practice. As was true in Phillips, the trial court's decision to substitute the alternate was made in the context of a trial of truly epic proportions in terms of length, scope and expense to both sides. We endorse the statement in Phillips that, 'Our conclusion that the district court committed no reversible error must likewise be understood as limited to such an exceptional context.' 664 F.2d at 996.
>
> It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is 'the rule' and the substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in extraordinary situations and, even then, only when extraordinary precautions are taken, as was done below, to ensure that the defendants are not prejudiced."

The decision in Lamb, is fully supported by the history leading to the

formulation and adoption of the Rule. The Rule went through five drafts and two preliminary drafts, the second preliminary draft being dated February, 1944 before the current form was accepted. In the initial drafts, provision was made for keeping the alternate juror available to replace a regular juror who might be disqualified during deliberations. It was not until the second preliminary draft that these provisions were finally dropped with the result that no allowance was made for the use of alternate jurors for the first time at the stage of deliberation. In other words, the history of the Rule reflects that, initially, the alternates were to be permitted to join an already deliberating jury. Precautions were made to insure that the alternate would remain qualified. However, the consensus appears to be that the alternates should not be

permitted to join an already deliberating juror and, therefore, the efforts to insure the availability and continued qualification of the alternate were dropped. (See Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43, 46. As is stated in United States v. Virginia Erection Corporation, 335 F.2d 868, 871 4th Cir. 1964):

> "The Committee history leading to the formulation and adoption of Rule 24 discloses that the United States Supreme Court Advisory Committee on Rules of Criminal Procedure seriously considered the possibility of permitting an alternate juror to replace a regular juror who becomes disabled during the jury's deliberations but rejected it after the desirability and constitutionality of such procedure had been questioned by the Supreme Court."

And while one state Supreme Court, People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976) cert. den. 429 U.S. 1077 (1977) has said that the substitution of an

alternate for a regular juror after deliberations has begun is not unconstitutional, another state Supreme Court, in People v. Ryan, 19 N.Y.2d 100, 224 N.E.2d 710 (1966), has held that the procedure, even with the consent of the defendant's counsel, violates the constitution of the state.

In conclusion, there is a division among the circuits regarding the treatment of violations of Rule 24(c). Similarly, there is a conflict between the Supreme Courts of New York and California. Because of the magnitude and potential impact of this issue, and because of its apparent recent reoccurrence, this Court should issue a writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States

Court of Appeals for the 7th Circuit.

Respectfully submitted,

Robert J. Weber
221 N. LaSalle St.
Suite 3800
Chicago, IL 60601
(312) 782-1983

Counsel for Charles Soteras

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 83-2600, 83-2607

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEFIK AND CHARLES SOTERAS,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 865 -
Susan Getzendanner, Judge

ARGUED SETPEMBER 28, 1984
DECIDED JANUARY 22, 1985

Before CUDAHY and POSNER, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

POSNER, Circuit Judge. Josefik and Soteras were convicted by a jury of conspiracy to possess, and possession of, more than 1,000 cases of Chivas Regal scotch stolen from an interstate shipment (18 U.S.C. §§371, 659), and each was sentenced to eight years in prison and fined $7,000. They appeal on several grounds, the first being that the judge violated Rule 24(c) of the Federal Rules of Criminal Procedure by recalling an alternate juror.

At the end of the trial, the remaining alternate was excused and the jury retired to deliberate. This was at 5:45 p.m. but the jury had dinner before its deliberations, which did not begin till 7:30. At 7:39 one of the jurors sent a note to the judge asking to be excused. The jury stopped deliberating when this happened. Upon receiving the note the judge telephoned the alternate and told her not to discuss

the case with anyone and instructed the jury to come back into the courtroom. After questioning the juror who had asked to be excused and discovering that she had had trouble hearing during the trial, the judge excused her and sent the jury home with instructions to come back at 10:00 a.m. The next morning, in the presence of the defendants and their counsel, the judge questioned the recalled alternate who said she had not discussed the case with anyone. Counsel for both defendants consented to have the alternate juror added to the jury--though we shall see that there is a shadow over Josefik's consent. The recalled alternate then rejoined the jury, which returned a verdict of guilty that afternoon.

Rule 24(c) provides that "alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider

its verdict, become or are found to be unable or disqualified to perform their duties" (emphasis added) and that "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." There is no provision for recalling an alternate after he is discharged and we think policy as well as the language we have quoted from the rule (especially the part we have Italicized) forbid the practice. An alternate who joins the jury's deliberations after they have begun, even if he has not discussed the case with other people or forgotten the judge's (other) instructions in the interim, will be at a disadvantage in holding his own with the other jurors, and as a result the defendant may not really be getting the jury of 12 to which he is entitled. See Note of Advisory Comm. to 1983 Amendment to Fed. R. Crim. P 23(b); 8A Moore's Federal

Practice para. 23.04[3] (2d ed. 1984). But it is not always reversible error to recall an alternate who has been discharged. Suppose the alternate in this case had been recalled as she was leaving the courtroom 30 seconds after having been discharged. It would violate Rule 24(c) to put her back on the jury but there would be no prejudice to the defendants that would warrant reversal of their convictions; and only prejudicial violations of the rule are reversible errors. See, e.g., United States v. Barker, 735 F.2d 1280, 1282 (11th Cir. 1984); United States v. Foster, 711 F.2d 871, 886 (9th Cir. 1983); United States v. Kaminski, 692 F.2d 505, 518 (8th Cir. 1982); United States v. Kopituk, 690 F.2d 1289, 1309 (11th Cir. 1982).

There was no prejudice here even though the lapse of time between discharge and recall was much longer than in our

hypothetical case. The alternate was called less than two hours after she had been discharged, and told not to discuss the case with anyone; and she testified the next morning that she had not discussed the case either before or after the call. As the jury when she rejoined it was only nine minutes into its deliberations (and started over, at the trial judge's direction, when she rejoined it), she didn't miss anything important and could deliberate on a par with the original jurors. The deliberations continued for several hours until the jury reached its verdict; it seems most unlikely that the nine-minute deliberation the evening before could have been critical to that verdict.

Even if Josefik and Soteras were prejudiced by the violation of Rule 24(c), they waived any challenge by consenting to the alternate's recall. Although United

States v. Lamb, 529 F.2d 1153, 1156-57 (9th Cir. 1975) (en banc), states in dictum that a violation of Rule 24(c) cannot be waived, we cannot understand why not. No other circuit has followed the dictum. See, e.g. United States v. Barker, supra, 735 F.2d at 1283; United States v. Davis, 608 F.2d 698, 699 (6th Cir. 1979) (per curiam). Even panels of the Ninth Circuit have repeatedly rejected it. See United States v. Lopez, 581 F.2d 1338, 1342 (9th Cir. 1978); United States v. Foster, supra, 711 F.2d at 886; United States v. Crisco, 725 F.2d 1228, 1233 (9th Cir. 1984); United States v. Rubio, 727 F.2d 786, 799 n. 7 (9th Cir. 1984) (per curiam). If the defendant would prefer to take his chances with the jury in its reconstituted form rather than undergo the expense and uncertainty of a new trial, why should he not be allowed

to? Rule 23(b) allows the parties to stipulate to trial by a jury "of any number less than 12"; and of course the defendant can if he wants waive all right to a jury trial, see Rule 23(a). No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding this consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept. But nothing in the procedure used in this case shocks our consciences.

Josefik complains that his right to effective assistance of counsel was denied both when his lawyer failed to object to the recall of the alternate and at the time of sentencing (and also when Josefik moved for, and was denied, bond pending appeal--but this issue is not before us, because Josefik has not asked us to review

the district court's denial of bond pending appeal or to grant him such bond). The district judge made clear to the defendants and their lawyers that she would have declared a mistrial if the defendants, and perhaps if just one defendant, had asked her to do so in lieu of recalling the alternate; so we must consider whether the failure of Josefik's lawyer to make such a request was a manifestation of ineffective assistance of counsel, entitling Josefik to a new trial.

Josefik had failed to pay any part of his lawyer's bill, and the lawyer had made demand (without success) on the promissory note that Josefik had given and had made clear to Josefik that if there was another trial Josefik would have to get another lawyer. Josefik argues that it was his failure to pay the lawyer that made the lawyer advise him to accept the

recall of the alternate juror. But the lawyer's ability to collect his fee would be unaffected by whether Josefik won a new trial or submitted his fate to the reconstituted jury in this one, for the lawyer had no intention of throwing good money (or time) after bad by representing Josefik in any new trial, and thus had nothing to gain by counseling him one way or the other. But even if the lawyer had had a financial motivation to disserve his client (and realism requires recognition that a lawyer's financial incentives and his duty to his client sometimes conflict), it would not make everything he did ineffective assistance per se; ineffectiveness would still have to be shown. There is no evidence that the lawyer's advice to Josefik to accept the reconstituted juror was bad advice; the jury may have seemed (before it delivered its verdict)

as friendly to the defense as the jury at a new trial could be expected to be, or even more friendly. We certainly have no basis for concluding that the lawyer's advice was so bad (viewed ex ante, of course, not ex post--as matters turned out Josefik could not have done worse by getting a new trial) as to fall below minimum professional standards and thus violate Josefik's rights.

Shortly before Josefik was to be sentenced, the government submitted a supplemental presentence report which contained allegations that Josefik was an extortionist. Josefik's lawyer asked that the government be directed to produce the witness whose allegations these were and the court acceded to this request and held a hearing at which the witness was questioned by the government and cross-examined by Josefik's lawyer. Josefik's

principal complaint about the lawyer's handling of this matter is that the lawyer failed to obtain certain documents that, Josefik says, would have refuted the witness's testimony about extortion. But we have examined the documents, and they actually corroborate that testimony. As it would therefore have done no good to present them at the hearing, the lawyer's failure to do so cannot have harmed Josefik; and prejudice is part of the constitutional standard for ineffective assistance of counsel, see Strickland v. Washington, 104 S. Ct. 2052 2067-69 (1984), with exceptions immaterial to this case.

Josefik (here joined by Soteras) next complains that the judge erred when, in explaining to the jury what "knowingly" meant (as in the possession of goods known to be stolen, one of the crimes punished by 18 U.S.C. § 659), she said: "No person can intentionally avoid knowledge

by closing his eyes to facts which should prompt him to investigate." The defendants complain that this injects a negligence standard into the consideration of a crime requiring proof of intent, by allowing the jury to conclude that a failure to investigate suspicious facts signifies knowing misconduct. But to "intentionally" avoid knowledge implies more than carelessness; it implies something verging on knowledge, combined with a desire to escape the consequences of knowledge. Cf Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 178-79 (1979). It is enough for guilt of knowing possession of stolen property. See Perkins & Boyce, Criminal Law 401 (3d ed. 1984). We therefore have upheld in other cases the identical instruction that the defendants in this one challenge, see, e.g., United States v. Petullo, 709 F.2d 1178, 1181 (7th Cir.

1983); United States v. Burns, 683 F.2d 1056, 1059-61 (7th Cir. 1982) (per curiam), while remarking that it is "somewhat opaque," id. at 1061. A clearer instruction would be, "with a conscious purpose to avoid learning the truth," see United States v. Natelli, 527 F.2d 311, 323 (2d Cir. 1975); cf. 1 Devitt & Blackmar, Federal Jury Practice and Instructions § 14.09 (3d ed. 1977), and maybe "conscious" is redundant, and "purpose to avoid learning the truth" would be better. Or maybe the jury should be asked whether the defendant "willfully shut his eyes for fear of what he would learn." See Perkins & Boyce, supra, at 401.

But small differences in the wording of instructions will rarely have such impact on the jury as to warrant reversal; and the substance of the instruction was certainly material to the issues in this case. Soteras had offered someone Chivas Regal that was "not too hot" (i.e., that

had been stolen, but was not yet being sought by the police) at little more than half its wholesale price. The FBI got wind of the transaction and sent an undercover agent, posing as a buyer, to deal with Soteras and his associates, who included Josefik. Josefik helped in arranging the deal and transferring the scotch (which was stored in a warehouse that Josefik rented space in) to the FBI agent. It is inconceivable that Josefik did not believe that scotch was stolen, and in context all the challenged instruction meant is that he could not get off the hook simply by resolutely refusing to find out for sure whether it was stolen. Incidentally, the instruction was completely harmless as to Soteras, for there was direct evidence that he himself described the scotch as stolen.

From what we have said it should be clear that we reject Josefik's last ground of appeal as well; that a reasonable jury

could not have found him guilty beyond a reasonably doubt of possession and conspiracy to possess scotch whiskey which all agree had been stolen from an interstate shipment.

The judgments of conviction are

AFFIRMED.

A true Copy:
Teste:

_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit